



NORTHWEST ENVIRONMENTAL DEFENSE CENTER
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May 7, 2013

FREEDOM OF INFORMATION ACT REQUEST

Via Electronic Mail:

Freedom of Information Act Officer
U.S. Corps of Engineers, Portland District
Office of Counsel
P.O. Box 2946
Portland, OR 97208-2946

Tyler J. Krug: Tyler.J.Krug@usace.army.mil
North Bend Field Office
2201 N. Broadway Suite C
North Bend, Oregon 97459-2372

Re: Freedom of Information Act Request for Documents Relating to the Chetco River Gravel Mining

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 551 *et seq.*, the Northwest Environmental Defense Center ("NEDC") respectfully requests records held by the United States Army Corps of Engineers ("Corps") that pertain and relate to commercial gravel mining activities in the Chetco River.

Authorizing Commercial Gravel Mining on the Chetco River

On July 15, 2011, the Corps issued a Regional General Permit for Commercial Gravel Mining in the Chetco River Curry County, Oregon ("RGP"). The RGP required the permittees to produce several including a Pre-harvest Survey, Permit 3.b, and a Post Excavation Report, *id.* 3.c. In addition, one of the Permittees, Freeman Rock, Inc., was required to submit an required to submit "detailed design plans" for the Jack Creek Restoration Project by no later than July, 11, 2012. In turn, the Corps, as part of the Review Team established under the RGP, was required to "conduct a pre-harvest site visit to evaluate bar specific conditions" and "establish extractable volumes for each site" and issue an Extraction Plan for each site.

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On April 26, 2013, the Corps issued a Public Notice that received an application from Freeman Rock to up to 100,000 cubic yards (CY) of aggregate annually (up to 500,000 CY over the five-year life of the permit) from the Chetco River for the purpose of commercial sale. The notice announced a 30 day public comment period on the application. The Corps has failed to provide the public the information necessary to comment on this proposal, however.

Freedom of Information Act Request

Pursuant to FOIA, NEDC requests the following records:

1. All Pre-harvest Surveys prepared by the RGP permittees and all related records;
2. All Post Excavation Reports prepared by the RGP permittees and all related records;
3. All records related to the pre-harvest site visits performed by the Review Team and/or the Corps;
4. All records related to the establishment of the extractable volumes of gravel from each site under the RGP and all related records;
5. All Extractions Plans prepared by the Review Team and/or the Corps and all related records;
6. All plans submitted by Freeman Rock for the Jack Creek Restoration Project and all related records;
7. All records related to any mitigation work completed under the RGP, including but not limited to the Jack Creek Restoration Project, and all related records;
8. Any application for a Department of the Army permit to remove aggregate, gravel, sand or rock from the Chetco River received by the Corps since January 1, 2011;
9. All records on or relating to the application which is the subject of the Corps' Public Notice NWP-2006-927-1, posted April 26, 2013;
10. All records of communications between the Corps and Freeman Rock regarding the removal of aggregate from the Chetco River since January 1, 2013, and all related records;
11. All records of communications between the Corps and Tidewater Contractors regarding the removal of aggregate from the Chetco River since January 1, 2013, and all related records;

12. All records related to the need for aggregate for public and private infrastructure construction in southern Oregon;
13. All records related to the available sources of aggregate for public and private infrastructure construction in southern Oregon;
14. All records related to sources of aggregate for public and private infrastructure construction in southern Oregon that do not require access to waters of the United States;
15. All records of communication between the Corps and any other commercial operation or gravel industry representative, including but not limited to the Oregon Concrete and Aggregate Producers Association regarding any plans or applications to remove aggregate, gravel, sand or rock from the Chetco River since January 1, 2013, and all related records;
16. All records of communication between the Corps and Oregon state agencies, including, but not limited to, the Department of Environmental Quality, Department of State Lands, Department of Fish and Wildlife, and the Department of Land Conservation and Development on any plans or applications received by the Corps to remove aggregate, gravel, sand or rock from the Chetco River since March 28, 2013, and all related records;
17. All records of communication between the Corps and 1) the U.S. Fish and Wildlife Service, 2) National Marine Fisheries Service, 3) the U.S. Environmental Protection Agency and/or 4) U.S. Department of Justice on any plans or applications received by the Corps to remove aggregate, gravel, sand or rock from the Chetco River since March 28, 2013, and all related records.

This request applies to records in whatever form, including, but not limited to: documents, files (and their contents), photographs, video tapes, surveys, reports, memoranda, applications, letters, notices, notes (electronic, handwritten, or otherwise), meeting minutes, graphs, charts, maps, spreadsheets, correspondence, email messages, data and electronic files. It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record.

I. Request for Fee Waiver

NEDC requests that you waive all fees in connection with this request. NEDC is dedicated to the protection and restoration of the environment and natural resources of the Pacific Northwest. Our members live, work, and engage in recreational activities on and near the Chetco, Willamette, and Columbia Rivers, among others. NEDC works to educate our members and the general public about activities affecting Oregon's environment and natural resources, including proposed gravel mining activities in various watersheds throughout Oregon. There is a long history of gravel mining activity in Oregon watersheds. The Corps is subject to a multitude of legal obligations including requirements of the Clean Water Act, Rivers and Harbors Act,

Endangered Species Act, Essential Fish Habitat consultations, and Oregon state law.

FOIA carries a presumption of disclosure and the fee waiver was designed specifically to allow nonprofit, public interest groups, such as NEDC, access to government documents without the payment of fees. The courts have stated that the statute "is to be liberally construed *in favor of waivers* for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy))(emphasis added). Additionally, upon taking office, President Obama issued a memorandum to all federal departments and agencies directing that:

[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA. http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/

As shown below, NEDC meets FOIA's two-pronged test for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii); see 32 C.F.R. § 286.28(d); 32 C.F.R. § 518.19(d). Under the FOIA and the Department of Defense and Department of the Army's implementing regulations, the fee associated with the document production is waived if the release of the information is in the "public interest." 5 U.S.C. § 552(a)(4)(A)(iii) ("documents shall be furnished without charge . . . [when it is determined] that waiver . . . is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of [the Corps] and is not primarily in the commercial interest of the requester."); 32 C.F.R. § 286.28(d)(1); 32 C.F.R. § 518.19(d).

A. Disclosure of this information is in the public interest because furnishing the information will contribute significantly to public understanding of the operations or activities of the Corps.

NEDC qualifies for the fee waiver because the requested information will contribute significantly to the public understanding of the operations or activities of the Corps and because NEDC, which is generally recognized as an established expert in the field of environmental protection and CWA compliance, possesses the ability to disseminate the requested information to the general public.

1. The subject matter of the request concerns the operations and activities of the Corps.

The information requested concerns the operations and activities of the Corps. 32 C.F.R. § 286.28(d)(3)(i)(A); 32 C.F.R. § 518.19(d)(2)(i). Any documents relating to the Corps' assessment of permits for commercial gravel mining activities in various watersheds throughout Oregon will provide insight into the manner in which the Corps is carrying out its duties under federal regulations.

- 2. The information to be disclosed has important informative value because it is meaningful and shall inform the public of the operations or activities of the Corps.**

Disclosure of this information will contribute to a meaningful understanding of the Corps' operations and activities as they relate to protection of water resources in Oregon. *See* 32 C.F.R. § 286.28(d)(3)(i)(B); 32 C.F.R. § 518.19(d)(2)(ii). NEDC has long-standing interests in the protection of water resources in Oregon and the Pacific Northwest, including participating in legal actions seeking to enforce the CWA. As a result, the organization has developed a great deal of expertise on water issues, and has also developed an extensive network of persons across the state, and country, who are interested and active in water resources protection. Because water is a critical natural resource of the Pacific Northwest, information regarding the development of Permits for commercial gravel mining activities in watersheds throughout Oregon will contribute to a meaningful understanding by the public of the Corps' operations or activities. There is already an audience eager for more information on the threats to water resources, steps being taken to protect water resources, and what impacts government actions will have on water resources in Oregon. Therefore, utilizing the various resources for analyzing and disseminating the information, discussed below, NEDC will again act as a conduit providing access to this information sought by the general public.

- 3. The disclosure of this information will contribute to the general public's understanding of the operations and activities of the Corps.**

NEDC will use this information to contribute to the public understanding of how the Corps meets its statutory duties to protect water resources under the CWA. *See* 32 C.F.R. § 286.28(d)(3)(i)(C); 32 C.F.R. § 518.19(d)(2)(iii). Information that could "support oversight of [an agency's] operations" is precisely the type of information that Congress considered to have a "high potential for contribution to public understanding." *McClellan Ecological*, 835 F.2d at 1286. NEDC, long known for its leadership role on natural resource issues, uses a combination of education, research, and advocacy to advance its mission of informing the public on how the government is undertaking to protect natural resources and the environment. NEDC intends to use the requested records to examine how the Corps is meeting its obligations to protect water resources in Oregon.

After reviewing the information provided, NEDC intends to use its resources and expertise to inform and educate the public regarding the effect of the Corps' enforcement of the CWA on both Oregon's water resources and the environment generally. This information will be disseminated to our members and supporters through our website, Facebook page, electronic media updates, printed newsletter, and other advocacy work, all of which are available free of charge to interested parties.

- 4. The disclosure will be unique in contributing previously unknown facts, thereby enhancing public knowledge of the Corps' operations or activities.**

The disclosure of this information is of wide public interest and will be unique in

contributing previously unknown facts, thereby enhancing public knowledge of the Corps' operations or activities. See 32 C.F.R. § 286.28(d)(3)(i)(D); 32 C.F.R. § 518.19(d)(2)(iv). Public oversight and enhanced understanding of the Corps' enforcement of the CWA is absolutely necessary. NEDC's consistent contribution to the public's understanding of federal agency activities and their effect on the environment, as compared to the level of public understanding prior to disclosure, are well established. Review of records concerning the Corps' implementation and enforcement of the CWA with regard to permits for commercial graveling mining will allow for public oversight of the Corps' actions as they relate to protection of various watersheds throughout Oregon and other impacted natural resources.

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is "whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Carney v U.S. Dept. of Justice*, 19 F.3d 807, 815 (2nd Cir. 1994). NEDC is comprised of professionals with scientific and legal expertise who regularly write, speak, and teach on water resources protection and other issues and as demonstrated above, NEDC is uniquely qualified to disseminate the information to a large cross-section of the population.

B. Obtaining the information is of no commercial interest to NEDC

The second element of the fee waiver analysis addresses the requester's "commercial interest" in the information. The Department's regulations list two factors to consider in determining whether the information is "primarily in the commercial interest of the requester." The first factor is "the existence and magnitude of a commercial interest." 32 C.F.R. § 286.28(d)(3)(ii)(A); 32 C.F.R. § 518.19(d)(3)(i). Here, as a 501(c)(3) nonprofit, NEDC has no commercial, trade or profit interest in the material requested. NEDC will not be paid for, or receive other commercial benefits from the publication or dissemination of the material requested.

The second factor hinges on "the primary interest in the disclosure." 32 C.F.R. § 286.28(d)(3)(ii)(B); 32 C.F.R. § 518.19(d)(3)(ii). Clearly, there is great public interest in the release of the materials sought because they will allow for a more thorough analysis of how the Corps is working to protect water resources. Thus, assuming *arguendo*, that NEDC had some "commercial" interest in the documents requested, a complete fee waiver would still be appropriate because NEDC's primary interest in the material is to inform the public about the operations and activities of the Corps that affected the level of protections afforded water resources in Oregon. Therefore, the disclosure of the information is not "primarily in the commercial interest of" NEDC and a fee waiver is appropriate. *Id.*

II. Exempted and nonexistent documents

Please include in your response an explanation of which documents, if any, may be privileged or exempt from this FOIA request and why. If you claim that the records should not be disclosed, please justify your refusal by referring to the specific exemption that you are invoking under the FOIA. Also, please provide those portions of documents with information requested that are not specifically exempted from disclosure. If the documents do not exist,

please indicate that in your written response.

III. Expedited Review is Warranted

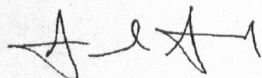
The expedited review of this request is warranted because NEDC has a compelling need to obtain this information in a timely manner. 32 C.F.R. § 286.4(d). As noted above, the Corps has released a Public Notice on an application to remove 100,000 cubic yards of aggregate from the Chetco annually for the next five years. The public comment period on this Public Notice is limited to 30 days. The proposed action represents an unprecedented application for extraction of gravel from the Chetco River as it represents a significant increase the requested extraction allotment. The negative impact of such mining, if authorized, on the river would be dramatic and potentially irreversible. Indeed, an operation of this size would be a return to the practices seen decades ago before the gravel mining industry was properly regulated on the Chetco. Those practices, as every state and federal agency that has studied the Chetco River, including the Corps, has concluded, dramatically altered the river and were unsustainable.

All of the information requested here is information that should have been released with public notice and is necessary to ensure the public has the ability to meaningfully participate in the permitting process. As discussed above, one of NEDC's primary functions is to disseminate information on government actions to the public. This is precisely the intended use of the information here—namely, to ensure public access to this information during this comment period. Thus, the information is urgently needed as it is only real value will be found if it is available in time to be used to provide input on the Public Notice.

Conclusion

As provided by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the implementing regulations, I trust that I shall receive a reply to this request within ten business days of receipt. Thank you for your time and attention in this matter, and I look forward to hearing from you shortly. If you have any questions, feel free to contact NEDC at (503) 768-6673.

Sincerely,



Andrew Hawley
Staff Attorney